to their work when the traders after a few years wanted to be transferred elsewhere, "Well, the climate doesn't seem to hurt them; you see they are so interested in their work." Ross foresees one of the great influences of Christianity in "that it is bound to raise continually the religious claim of the Chinese by forcing the native faiths to assume higher and higher forms in order to survive."

Professor Ross pays particular attention to the attempt of the Chinese to set up schools of their own which shall take the place of the old classical education and give the same kind of western training as the mission schools. He is one of the most recent and trustworthy witnesses to the fact that, down to the founding of the republic, those schools had made little headway. They are subject to student strikes and disorders; they have not a sufficient number of teachers who are really acquainted with things western; and one of the first tasks of the new government, if it is going to succeed, is to put those schools on a footing where they can begin the work of educating the whole people.

Professor Ross has written perhaps the best recent book upon China, for it takes up in a sympathetic spirit, but with keen insight, and a facility for seizing upon the essentials of the question, those phases of Chinese life and character which will count most in the reconstruction of the country.

ALBERT BUSHNELL HART.

Social Reform and the Constitution. By FRANK J. GOODNOW, LL.D., Eaton Professor of Administrative Law at Columbia University. (New York: The Macmillan Company, 1911. Pp. 365.)

In his now famous address of December 12, 1906, before the Pennsylvania Society, Mr. Root, then Secretary of State, promised that "sooner or later" certain "constructions of the Constitution" would be "found": what Professor Goodnow does in this work is to show that they *exist.* His purpose he states in his preface thus: "The attempt has been to ascertain, from an examination of the decisions . . . particularly . . . of the United States Supreme Court, to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the

most progressive peoples of the present day." Setting out with this end in view, the author effects a piece-meal reconstruction of the Constitution which establishes for Congress, the power to regulate intrastate commerce so far as is necessary for the effective regulation of interstate commerce (p. 53); the power, through its right "to prohibit the interstate and foreign transportation of articles made contrary to the provisions of its legislation," to "exercise an enormous influence in securing uniform regulation of all the conditions of manufacturing in this country" (p. 92); the "power to create a system of interstate commerce under complete federal control, to include within that system the manufacture or other production of goods to be passed in such commerce, and to protect this system, in all its details from any species of State interference" (p. 145); its power to provide a general system of private law which the United States courts shall administer in controversies between citizens of different States" (ch. IV); the power within undefined limits to regulate the distribution of property by progressive taxation of inheritances (p. 281); the probable power to provide by taxation a system of old age and sickness pensions, "particularly if confined to indigent persons" (p. 317); and so forth. Finally the limits set for the power of the States by the Fourteenth Amendment in social legislation are discussed, in which connection it is pointed out that the State courts are apt to be more zealous defenders of the rights of property supposed to be secured by the Fourteenth Amendment than is the Supreme Court of the United States. It is hardly strange that this should be so. For the truth of the matter is that the modern concept of due process of law is not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency.

It is in this connection that I have to make a very serious criticism of the work under review: namely, of the author's treatment of the Fifth Amendment as if it were controlling upon the power of Congress in the same broad sense that the Fourteenth Amendment is upon the power of the State Legislatures (pp. 88, 144, 265). But can this be the case? The doctrine of due process of law in the recent loose sense of "reasonable law" (that is, what the court finds to be reasonable law) is merely the old doctrine of vested rights somewhat diluted by the doctrine of the police power. The doctrine of vested rights, however, rested upon the hypothesis of the recognition by the common

law of certain fundamental rights which the people of the respective States possessed from the outset and which they could not be supposed to have parted with by mere implication in establishing the legislative branch of the government. But now entirely aside from the fact that there is no such thing as a common law of the United States, the power of Congress is not a loosely granted general power of legislation, but a group of specifically granted powers. While, therefore, the federal courts from the outset, in cases which have fallen to their jurisdiction because of the character of the parties involved, repeatedly passed upon the validity of State laws under "general principles of constitutional law," the United States has always been conceived strictly as a government of delegated powers, neither deriving competence from nor yet finding limitation in principles external to the Constitution. I am aware, of course, that doctrine to a contrary effect has sometimes been broached in *obiter dicta*, for example, by Taney in his opinion in the Dred Scott Case, where it is amply refuted by Justice Curtis; by Chase in Hepburn *v.* Griswold, which was overturned the next year; by the dissenting judges in the Sinking Fund Cases; by Justice Brewer in the Monongahela Navigation Case (cited p. 88), where, however, the decision rests upon the due compensation clause of the Fifth Amendment; again by some of the judges in the Northern Securities Company Case. And undoubtedly there was a time when the Supreme Court, under the dominance of *Laisser Faire* principles, would fain have extended the doctrine of natural rights, as embodied in the doctrine of due process of law, to the Fifth Amendment. But the decision in the United States *v.* Adair, particularly when read in conjunction with the decision in United States *v.* Delaware & Hudson Canal Co., I take to amount to notice that the court is unwilling to act as a third house of Congress. At least it is to be hoped that this is the case. The doctrine of due process of law as a restriction upon forty-eight State Legislatures armed with powers to molest property interests spread throughout the country, has much to be said in its favor, but even in this connection it has produced some egregious results and the present indications are that the Supreme Court would like to get rid of it. (Cf. Welch *v.* Swazey, 214 U. S.; Noble State Bank *v.* Haskell, 219 U. S. 104.) But to accept it as a restriction upon Congress would be a most deplorable step. Not only would it indeed make the Supreme Court the "tyrant of the Constitution," but in the interval between the enactment of a congressional statute and a

final decision by the Supreme Court, it would turn all the lower federal courts and the courts of half a hundred States loose upon the flanks of national legislation. (Cf. the decision of the Connecticut Supreme Court in the famous Hoxie case.) Besides, the responsibility of the courts in their use of the doctrine of due process of law for the general condition of corporate lawlessness in this country is certainly most serious.

But finally, Professor Goodnow by his too ready acceptance of this less than half-baked doctrine of due process of law as a restriction upon congressional power, seriously jeopardizes what is perhaps the principal item of his own thesis, namely, the right of Congress to prohibit the interstate or foreign transportation of articles made contrary to congressional enactment, The decision upon which he most relies in this connection is that of Champion *v.* Ames, in which the right of Congress to exclude lottery tickets from interstate commerce was upheld. But this is also one of the decisions which he cites (p. 88) in support of his interpretation of the Fifth Amendment. But the point is that Champion *v.* Ames cannot be cited in both these connections. For if it be cited in support of the doctrine of due process of law, then the only proposition it supports with reference to the power of Congress is that that power may exclude from interstate commerce articles commerce in which is "a kind of traffic which no one can be entitled to pursue of right" (188 U. S. 358), on account of the quality of the articles themselves. Whereas if it be cited in support of the power of Congress, it must be with the result of divesting the precise ruling of the Court from the dicta which would interpose the Fifth Amendment as a bar to Congressional power. But the truth of the matter is that these dicta are altogether false and misleading. That the framers of the Constitution intended that the power of Congress in the regulation of commerce should extend to prohibition at the discretion of Congress is shown in an absolutely unmistakable manner by the specific restriction with reference to the prohibition of the slave trade. The true doctrine therefore is that stated by Marshall in Gibbons *v.* Ogden: "What is this power" Marshall there inquires, and proceeds to answer his own question thus: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms. . . .

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The second main criticism I would make of the book is, that at points the argument is unnecessarily complicated. The author is too scrupulous to restore where a revival would have done better. Thus, I venture to say, every leading proposition established in the seventy pages of minute argument of Chapter II is adequately supported by Marshall's great decision in Gibbons *v.* Odgen. The defence for the author's method is this: that subsequently to Gibbons *v.* Odgen, McCulloch *v.* Maryland, and Cohens *v.* Virginia, the constitution fell into the hands of a court which was bent upon regarding it, not as a charter of national power, but a bulwark of State rights. The result was the shattering of the vase of national sovereignty, which must now be restored fragment by fragment. But the argument for a different procedure is also strong. During the last twenty years the court has not hesitated to return to Marshall's ideas whenever it has suited its purpose to check State power in the interest of business. (Cf. Leisy *v.* Hardin, 135 U. S.), but on the other hand it has just as readily professed State-rights principles when desirous of checking Congress (Cf. Employers' Liability Cases, 207 U. S.; United States *v.* Adair, 208 U. S.; United States *v.* Keller, 213 U. S.). But the time for this judicial obscurantism, or "playing both ends against the middle," is at an end, and a ringing reiteration of fundamental principles is what is once more needed. Nor indeed does Professor Goodnow, despite his usual method, entirely ignore these more general considerations (pp. 91–3; 115).

A few minor criticisms may be added. On page 51, the author says that "perhaps" Chief Justice Marshall conceded the existence of an intrastate commerce which was not subject to the regulation of Congress. This conjecture is erroneous. Marshall recognized a distinction between intrastate and interstate commerce, but he was plainly of the view that Congress could reach the former "for national purposes." And it goes without saying that Marshall never regarded it as an available objection to a Congressional measure which was otherwise constitutional, that it entered the field normally occupied by the states by virtue of their reserved powers. The

notion of the reserved powers of the States as comprising an independent limitation upon national power came into existence after Marshall's death.

So far as the argument, in Chapter III, for a national power of incorporation of companies engaged in interstate commerce is rested upon the precise ruling in McCulloch *v.* Maryland upholding the charter of the Second United States Bank, it is *non sequiter*, the primary power of Congress being, not the power to carry on interstate commerce, but the power to regulate such commerce. The power of the national government to force persons engaged in interstate commerce to take out national charters rests simply upon the "necessary and proper" clause of the constitution and the general principles by which that clause was construed by the framers of the Constitution themselves. (Federalist 23.)

On pages 94–5 Plumley *v.* Massachusetts is inadvertently misinterpreted in a way to lend countenance to the theory that the Fifth Amendment restricts Congress in the exercise of its commercial powers. But the court ruled specifically in that case that the act of Congress drawn in question "was not intended to be and is not a regulation of Congress among the States" and that "the vital question was therefore unaffected by" said act.

On pages 293–4, after quoting a passage from Justice Miller's opinion in Loan Association *v.* Topeka, in which the doctrine that a tax must be for a public purpose is referred to the doctrine of the social compact, the author asserts that this language is used in interpretation of the constitution of the State of Kansas, and then cites Fallbrook Irrigation District *v.* Bradley, in which the ruling in the earlier case is based upon the Fourteenth Amendment and the general doctrine of that case disavowed. But the explanation that the court makes of the Loan Association case in the later case is false. Justice Miller himself explained in Davidson *v.* New Orleans (99 U. S.) that the Loan Association decision rested upon "the general principles of constitutional law." Also the transference of the maxim that taxation must be for public purpose, as a judicially enforceable limitation upon legislative power, to the Fourteenth Amendment makes no material difference with the operation of that limitation; but it does furnish us a side light again upon the real character of such "constitutional" limitations.

Finally, in his opening pages, the author passes the usual criticism of modern reformers upon the compact theory of eighteenth century

political philosophy. But if it is meant to be inferred that the compact theory furnishes any substantial justification for the doctrine of constitutional limitations that the courts of this country have built up, largely within the last thirty years, the criticism is misleading. For it must always be remembered that this same compact theory also furnishes the starting point of the principle of majority rule and the utilitarian doctrines of modern reform.

Notwithstanding these criticisms, which all relate to the history of our constitutional law rather than to the contemporary aspects of it in which Professor Goodnow is primarily interested, this is a most notable volume; and should be put into the hands of every judge in the land. For a considerable portion of them the mere discovery that the machinery of constitutional exegesis *can* be utilized to forward the public interest as well as private interests would amount to a genuine revelation. The most notable chapter in the book, from the point of view of original thinking, is Chapter IV, on the "Power of Congress over the Private Law in Force in the United States."

This is a fine piece of constructive work and should be read by all students of constitutional law.

But the most notable thing about the book as a whole is the lesson it conveys; that if it eventually turns out that the Constitution is not an adequate vehicle of a modern state, the fault will not have been with the instrument itself, nor with its framers, nor yet with those who first interpreted it, but with its official guardians today, who, to say the least, have a fair choice between principles that will adapt that instrument, in the words of Marshall, "to the various crises in human affairs" "for ages to come" and between more restrictive concepts a really straightforward application of which would have throttled the national life long before this.

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The History of the Government of Denver With Special Reference to its Relations With Public Service Corporations. By CLYDE LYNDON KING, A. M. (Denver: The Fisher Book Company, 1911. Pp. 322.)

Though written as a doctor's thesis at the University of Pennsylvania, the scope of the book is more comprehensive than is common with such monographs. The most important part of this book